Supreme Court, U.S
FILED

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In The

Supreme Court of the United States

CALLISTUS ORISAKWE,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in dismissing Petitioner's appeal, which arose from an adverse judgment on his application for writ of coram nobis, apparently on the grounds that he had made an insufficient showing of entitlement to relief on coram nobis?

LIST OF PARTIES

Callistus Orisakwe, Defendant/Appellant/Petitioner was represented below and in this petition by John D. Nation, 2650 KPMG Tower, 717 N. Harwood, LB 126, Dallas, Texas 75201.

The United States of America was represented on petition for coram nobis by Hon. Daniel Guess, Assistant U.S. Attorney, 1100 Commerce, 3rd Floor, Dallas, Texas 75242. The Government was represented on appeal by Hon. Susan Cowger, Assistant U.S. Attorney, of the same address.

The petition was heard before Hon. William Sanderson, United States Magistrate and Hon. Jerry Buchmeyer, United States District Court for the Northern District of Texas, Dallas Division.

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CITATIONS TO THE ORIGINAL REPORTS

United States v. Callistus Orisakwe, No. 01-10317 (5th Cir. September 26, 2001), from which certiorari is taken, is not published in the official reporter. It is, however, attached to this petition in the appendix.

STATEMENT OF JURISDICTION

The trial court entered judgment denying Petitioner's request for writ of coram nobis on December 5, 2000. The judgment was entered on the docket December 7, 2000. Petitioner timely filed notice of appeal February 5, 2001. The Fifth Circuit entered judgment dismissing the appeal on September 16, 2001. This petition is timely filed within ninety days of this judgment. The basis for jurisdiction is 28 U.S.C.§ 1254 (1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part:

[N]or be deprived of life, liberty or property without due process of law.

STATEMENT OF THE CASE

Callistus Orisakwe, a Nigerian legal resident of the United States, filed a petition for writ of coram nobis in the United States District Court, Northern District of Texas, Dallas Division. In his petition, he contended that he received ineffective assistance of counsel on his previous guilty plea to the offenses of conspiracy to commit bank fraud and money laundering, for which he received a 51 month sentence.

Petitioner's initial trial counsel, and the court, allowed Petitioner to plead guilty to the conspiracy count even though

Petitioner stated that he did not wish to plead guilty to conspiracy to commit money laundering. The trial judge told Petitioner that he could object to any relevant conduct on money laundering in the presentence report, but the court would be the final judge on the matter. The presentence report did factor in relevant conduct on money laundering, and the trial court sentenced Petitioner accordingly.

Petitioner's sentence was vacated on appeal, the Fifth Circuit treating the problem as a sentencing error. In his coram nobis petition, Petitioner submitted that even though he had never served the additional sentence relating to the money laundering relevant conduct, his original plea was still involuntary. If the plea was involuntary on the basis that Petitioner was pleading guilty to conspiracy, but was not guilty of one of the alleged objects of that conspiracy, how could the entire plea thus be considered voluntary?

The United States Magistrate recommended that relief be denied, opining that (a) the continuing viability of coram nobis is open to question; (b) Petitioner must show factual innocence to prevail on coram nobis and (c) Petitioner had failed to allege and show ineffective assistance of counsel. The Magistrate did not conduct an evidentiary hearing. The district court adopted the Magistrate's findings without further comment.

Petitioner appealed, filed his brief and an original record excerpts. The Government complained that the record excerpts were not sufficient. Additionally the Government filed a motion to dismiss the appeal, arguing that Petitioner had failed to make a sufficient showing of entitlement to relief on coram nobis and alleging that the record excerpts were insufficient. Petitioner completed an amended record excerpts which was tendered to the Court with a motion for leave to file.

The Fifth Circuit granted the Government's motion to dismiss the appeal without giving its reasons; the Court denied Petitioner's motion for leave to file amended record excerpts. *Orisakwe v. United States*, No. 01-10317 (5th Cir. September 26, 2001) (unpublished).

REASONS FOR ALLOWING THE WRIT

Petitioner's due process rights were violated in that he never received proper consideration on his writ of coram nobis. The continuing viability of the coram nobis writ is not open to question. The Fifth Circuit regularly considers appeals from such applications. *United States v. Dyer*, 136 F.3d 417, 422 (5th Cir. 1998). A coram nobis petitioner need not make a showing of factual innocence to prevail on the issue of ineffective counsel. *Mathis v. United States*, 369 U.S. 43 (4th Cir. 1996); *United States v. Golden*, 854 F.2d 31 (3d Cir. 1988).

The trial court never considered the ineffectiveness claim. The Magistrate found no ineffective assistance because

the Fifth Circuit reversed the sentence for including money laundering relevant conduct. As Petitioner had shown, however, this was the beginning, not the end, of the inquiry.

In its motion to dismiss the Government added two further grounds for denial: insufficient reasons for not filing earlier and lack of collateral consequences. The Magistrate's opinion, by its silence, apparently considered neither factor a deficiency. In any event, the court did not conduct an evidentiary hearing to allow inquiry into these matters.

The Fifth Circuit's order of dismissal, if based on substantive grounds, was erroneous. Neither the trial court nor the Magistrate ever considered Petitioner's core contention: if the plea was involuntary on the basis that Petitioner was pleading guilty to conspiracy, but was not guilty of one of the alleged objects of that conspiracy, how could the entire plea thus be considered voluntary? From the dismissal order, one can only wonder whether the Fifth Circuit considered this issue either.

If the Court dismissed on the Government's claim that the record excerpts were insufficient, then this ruling certainly was beyond the pale. The only "deficiency," which Petitioner was certainly then prepared to correct, was that the original record excerpts did not contain documents relating to the original conviction.

There is one further disturbing aspect to the Fifth Circuit's action. One assumes that the Government will in the future as well file motions to dismiss appeals from coram nobis actions. If the court continues to entertain these motions, it has in effect instituted a certificate of appealability requirement on the writ of coram nobis. No such limitation appears in the All Writs Act, 28 U.S.C. § 1651 (a). What Congress has not seen fit to do by legislation, the court should not do by opinion.

CONCLUSION

WHEREFORE, Petitioner prays that his petition for writ of certiorari be granted.

Respectfully submitted,

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COUNSEL OF RECORD

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 01-10317

CALLISTUS ORISAKWE
Petitioner—Appellant

v.

UNITED STATES OF AMERICA
Respondent—Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee to dismiss the appeal is granted.

IT IS FURTHER ORDERED that the alternative motion of appellee to extend time to file appellee's brief until 30 days from the date of this order is denied as moot.

IT IS FURTHER ORDERED that the motion of appellant to extend time to return sufficient record excerpts is denied.

Filed September 26, 2001

Note: actual rulings in this opinion (granted or denied) were handwritten.

App. 3

JUDGMENT ISSUED AS MANDATE

(same as previous document)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CALLISTUS ORISAKWE

VS. CIVIL ACTION NO. 3:00-cv-@012-R

UNITED STATES OF AMERICA

FINDINGS, CONCLUSION AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636 (b), and an order of the Court in implementation thereof, the subject cause has been previously referred to the United States District Judge. The findings, conclusions and recommendations of the Magistrate Judge, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for writ of error *coram nobis* filed by a person formerly convicted in this court. His term of incarceration was completed upon the entry of the court's judgment filed on or about June 30, 1993. His term of

supervised release was terminated with the entry of the court's order filed on June 16, 1995.

Statement of the Case: Orisakwe was charged in all eight counts of the indictment with violations of Title 18 U.S.C. §§ 371, 1030 (a) (2), 1344, 1956 (a) (1) (A) (i) and 2. Pursuant to a plea agreement, Petitioner entered a plea of guilty to Count 1 of the indictment, charging him with conspiracy, in exchange for the government's agreement to dismiss the remaining counts, which was accomplished on the date of his sentencing on January 24, 1992. *See also* Judgment filed on January 28, 1992.

Petitioner appealed his sentence, claiming that the court had used the wrong sentencing guidelines. On March 10, 1993, the Fifth Circuit vacated the sentence and remanded the case to the District Court for resentencing. On June 30, 1993, the court filed its judgment resentencing Orisakwe to time served with a three year term of supervised release, which was subsequently terminated on June 16, 1995.

Findings and Conclusions: A writ of error *coram nobis* is a "extraordinary remedy" intended to achieve justice when "errors of the most fundamental character" have occurred in a criminal proceeding. *United States v. Morgan*, 346 U.S. 502, 511-512, 74 S.Ct. 247, 252-43 (1954) (quoting *United States v. Mayer*, 235 U.S. 55, 69, 35 S.Ct. 16, 19 (1914)). It is available to a petitioner no longer in custody who seeks to vacate his conviction in circumstances where "the petitioner can demonstrate that he is suffering civil disabilities as a consequence of the criminal convictions and that the challenged error is of sufficient magnitude to justify the extraordinary relief." *United States v. Marcello*, 876 F.2d 1147, 1154 (5th Cir. 1989) (citations omitted). The remedy of *coram nobis* "should issue to correct only errors which result in a complete miscarriage of justice." *Id.*, (citing *Morgan*, 346 U.S. at 512, 74 S.Ct. at 253).

Orisakwe claims he received ineffective assistance of counsel at the guilty plea hearing. He argues his original plea

was involuntary because his counsel allowed him to plead guilty to an offense where he could receive the effect of relevant conduct (money laundering) as part of the Guideline calculation that he never claimed responsibility or guilt for committing.

In reviewing his initial sentence, the Fifth Circuit made clear that where Petitioner expressly eschewed any involvement in money laundering in the course of his sentencing allocution, the District Court could not use United States Sentencing Guidelines (U.S.S.G.) § 2S1.1—relating to money laundering—in calculating Petitioner's sentencing range. Thus, any error in counsel's conduct at or prior to his guilty plea was nullified upon the entry of the District Court's subsequent judgment.

Conspicuous by its absence is any claim that Petitioner was innocent of any wrongdoing, a circumstance which if proved might constitute an error of sufficient magnitude to

justify the extraordinary relief contemplated in the writ of *coram nobis*. Indeed for one to be found guilty of conspiracy requires only that a defendant be shown to have knowingly entered an illegal plan to commit violations of federal law, and that thereafter one or more of the conspirators commit an overt act(s) in furtherance of the conspiracy. In considering the extraordinary relief which Orisakwe seeks it is perhaps pertinent to observe that were he still serving his criminal sentence, 28 U.S.C. § 2255—the normal avenue for collaterally attacking a federal conviction—relief would be barred by the 1 year limitations period.[1]

Finally, Orisakwe has not alleged or proved that his attorney's representation was constitutionally deficient. Under the standard enunciated by the Supreme Court in Hill v. Lockhart, 474 U.S. 52, 60-61, 106 S.Ct. 366, 371 (1985), in order to establish ineffective assistance of counsel in the

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[1] In light of the Supreme Court's decision in *Carlisle v. United States*, 517 U.S. 416, 429, 116 S.Ct. 1460, 1467-1468 (1996), the continuing viability of the writ of *coram nobis* is open to question.

context of a guilty plea, a defendant must demonstrate not only that counsel's advice was constitutionally infirm, [2] but also but for such erroneous advice the defendant would have pled not guilty to the charges in the indictment and would have insisted on going to trial. *See also Craker v. McCotter*, 805 F.2d 538, 541-42 (5th Cir. 1986).

RECOMMENDATION:

For the foregoing reasons it is recommended that the District Court find that Orisakwe has failed to show any error of sufficient magnitude to justify the granting of *coram nobis*, and that his request for a writ of *coram nobis* be denied.

A copy of this recommendation shall be transmitted to counsel for Petitioner and for the government.

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[2] Petitioner cannot make such a showing because counsel successfully argued on appeal that the court could not use the "money laundering" guideline where Orisakwe never admitted any money laundering activity, and in fact specifically denied that he engaged in such conduct.

Signed this 20th day of November, 2000.

William F. Sanderson, Jr.
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CALLISTUS ORISAKWE

VS. No. 3-00-CV-2012-R

UNITED STATES OF AMERICA

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered, and a decision duly rendered,

It is ORDERED, ADJUDGED AND DECREED that Petitioner's request for a writ of coram nobis is denied.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this judgment and order adopting the Findings, Conclusions and Recommendation of the United States Magistrate Judge to counsel for the parties.

SIGNED AND ENTERED the 5th day of December, 2000.

App. 12

Jerry Buchmeyer
United States District Judge